



INDEPENDENT BROADCAST CONSULTANTS, INC.

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January 23, 1998

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

In re: MM Docket No. 97-234  
Notice of Proposed Rulemaking

Dear Ms. Salas:

With reference to the above-captioned proceeding, MM Docket 97-234, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services, we hereby offer our Formal Comment.

Attached hereto are the original and four (4) copies of said Comment. We also provide five (5) additional copies so that each Commissioner may have his or her own copy.

Furthermore, in accordance with instructions in the Docket's NPRM, we supply courtesy copies under separate cover to the attention of the three Commission offices listed in the Order.

Respectfully submitted,

  
William J. Sitzman  
President

cc: Mass Media Bureau  
Video Services Div.  
Room 702

Mass Media Bureau  
Audio Services Div.  
Room 302

Office of General Counsel  
Room 610

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FORMAL COMMENT

in the matter of

Implementation of Section 309(j)  
of the Communications Act  
-- Competitive Bidding for Commercial  
Broadcast and Instructional Television  
Fixed Service Licenses

MM Docket No. 97-234

January 1998

Submitted by:

William J. Sitzman

President

Independent Broadcast Consultants, Inc.

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of:

Implementation of Section 309(j) of the  
Communications Act -- Competitive Bidding  
for Commercial Broadcast and  
Instructional Television Fixed Service  
Licenses

MM Docket No. 97-234

To: The Commission

FORMAL COMMENT

Independent Broadcast Consultants, Inc. ("IBC"), of 110 County Road 146, Trumansburg, New York 14886-9721 hereby submits its Formal Comment in the above-referenced proceeding. MM Docket 97-234, a Notice of Proposed Rulemaking which proposes and seeks comment upon procedures by which the Commission would auction broadcast licenses. IBC advances its comments both from its standpoint as a broadcast engineering consulting firm of long standing and as a party holding direct and lengthy associations with broadcast applicants, permittees and licensees. IBC trusts its insights and opinions will be weighed carefully and sincerely by the Commission prior to final adoption of the proposals contained in the Notice of Proposed Rulemaking (NPRM), and that these opinions will be used to improve and strengthen the docket's proposals consistent with the public interest.

The text of the NPRM in MM Docket 97-234 is voluminous and its proposals sweeping. On certain details of the auction procedures, IBC holds no immediate opinion. And to comment on every aspect of the NPRM would far exceed the time or resources IBC can afford to expend on this pleading.

Rather, for the sake of both brevity and impact, IBC will confine its remarks to those issues raised by the NPRM which affect three broad objectives, each of which IBC passionately believes the Commission must uphold in its transition to an auction-based environment. These objectives are:

1. That any revised procedures must be consistent with the Commission's technical rules and its engineering standards of allocation;
2. That the Commission must provide the maximum opportunity to diversify the broadcast community through the entry of women, minorities, and most importantly, new, independent entrepreneurs; and
3. That any auction activities be made to conform with the Commission's unique mandate in the mass media services to uphold the principle that broadcasters serve the public interest, convenience and necessity.

#### BACKGROUND

Independent Broadcast Consultants, Inc. has for the past 25 years provided engineering consultant services to more than 400 AM, FM, or television broadcast licensees and applicants. Its president, William J. Sitzman, holds a First Class Radiotelephone license. He is a long-time member and current participant in the Society of Broadcast Engineers. He is also a former shareholder of WPIE Broadcasting, Inc., previous owner of AM broadcast station WPIE, Trumansburg, New York. Mr. Sitzman has over the past quarter-century submitted numerous technical reports to the Commission under his signature, reports which have secured IBC's clients construction permits or broadcast licenses. IBC's other staff engineers are likewise skilled and experienced in broadcast allocation engineering. In each instance, their qualifications are a matter of Commission record.

IBC may hold a unique distinction as being among only a few engineering consulting firms whose majority of business remains in the area of AM allocation. As such, IBC's engineers recognize the profound

differences between AM technical allotment procedures and those in the arenas of FM or TV. Also, IBC finds its client list dominated disproportionately by applicants or licensees in small-to-midsize markets. Therefore, IBC senses an ability to offer perspectives contributed by the "little guy," the smaller, independent broadcaster with whom IBC's engineers interact daily.

### OVERVIEW

IBC understands the Congressional mandate imposed by the Balanced Budget Act of 1997 to utilize auctions to decide mutually exclusive commercial broadcast applications. IBC realizes the Commission faces no choice but to implement procedures consistent with that mandate. Nonetheless, IBC does not welcome the change; and we fear the consequences. In a strictly auction-based environment, only money rules. An applicant's human qualifications, his or her communications experience, local residency, or promise to directly manage the broadcast enterprise carry no value whatsoever. Only the highest bid wins. And under the procedures advanced in the NPRM, only the flimsiest of technical submissions would qualify the successful bidder for a construction permit. Given the prices typically paid for unbuilt construction permits (as opposed to those for operating licensed stations), IBC doubts receipts from upcoming auctions will approach Congressional or Commission expectations. Nonetheless, on an individual market-by-market basis, consequences could devastate the lesser-capitalized upstart applicant seeking to establish his or her first station. Therefore, IBC urges the Commission to retain whatever nonfinancial safeguards it can while implementing its legislative directives. IBC recommends that only otherwise-qualified applicants be given access to auctions, that auction participation be limited to those applicants whose proposals carry a solid technical foundation, and that procedures be enacted to reward the serious applicant and discourage the idle speculator.

GENERAL AUCTION PROCEDURES

In its NPRM, the Commission invites comment on all aspects of its auction procedure, but maintains its proposed approach will promote, "the orderly and consistent filing of applications." To the contrary, IBC suggests the procedure would produce speculative pandemonium, shove both the smaller applicant and the public interest to the sidelines, and encourage serious abuse of the Commission's technical rules. Rather than adopt a "re-invent the wheel" approach to assigning broadcast construction permits, the Commission should continue its time-tested approach of accepting applications based on their legal, technical and financial merit and then determining their mutual exclusivity. Only after such mutual exclusivity is determined, should auctions be held as Congress demands. IBC worries most heavily that the NPRM's proposal for allowing short-form (Form 175) applications to qualify parties for auction, even when supplemented by additional technical data in non-table services, would open the door to technically-deficient filings by casual applicants with fat checkbooks. IBC recommends mutual exclusivity be determined and auctions established only after competing parties file long-form (Form 301) applications, and the Commission decides all applications are acceptable. IBC strongly objects to the Commission's tentative conclusion that any supplemental engineering data submitted with Form 175 would be evaluated only to determine mutual exclusivity. Instead, IBC urges all engineering data, whether submitted with short forms or long, be accorded full pre-acceptance processing. Such processing is particularly important in the AM service, where interference protection, both day and night, is demonstrated on a case-by-case basis, rather than through minimum distance separations. But IBC also recommends pre-auction long-form showings be required for FM and TV applications to affirm both the application's technical sufficiency and the applicant's sincerity.

Equally as worrisome is the Commission's suggestion in the NPRM that Form 301, Form 346 and Form 349 requirements be modified to delete the requirement for "reasonable assurance" of a valid antenna site. From an engineering perspective, a valid and viable site is the heart of a technical application. Deletion of this requirement, often the most difficult for an applicant to obtain, would only serve to open an allocation to casual speculation. Under the revision, a bidder could propose his tower be located in the town square or at the high school football field's 50-yard line, and the Commission would approve it! Substitution of strict construction time limits would only hamper those who encounter unexpected logistical or zoning delays; it could not serve as a cure to technical deficiency.

#### TREATMENT OF MAJOR CHANGE APPLICATIONS

As stated in the NPRM, the Balanced Budget Act of 1997 demands the Commission subject to competitive bidding mutually exclusive applications for, "any initial license or construction permit" (emphasis added). The Commission acknowledges it has not subjected mutually exclusive facility modification applications to competitive bidding, but now states it interprets the afore-mentioned language as authorizing such bidding to resolve conflicting modification proposals. IBC disagrees and views the Commission's interpretation as quite a stretch. IBC believes competitive bidding should only be used to comply with Congressional mandate. Clearly, the Budget Act's language does not require auctions in such instances; indeed, one could construe Congressional language as limiting auctions to new stations only. In the tightly-allocated AM spectrum, where facilities conflicts would most often arise, eligible bidders would usually be limited to two or three existing licensees. Rather than subject their respective applications to auction, IBC suggests an alternative under which the Commission would decide relative merit based on increased population served. IBC welcomes alternative suggestions. IBC also urges the pending freeze on major change applications be lifted as soon as possible.

#### TREATMENT OF PRE-JULY 1997 APPLICANTS

As legislation dictates, the Commission in its NPRM acknowledges that special procedures must apply to applicants who submitted initial construction permit applications prior to July 1, 1997 [Section 309(1)]. However, in the NPRM, the Commission tentatively proposes to utilize auctions to resolve those cases as well, even though the Balanced Budget Act of 1997 allows the Commission discretion to use alternative criteria. IBC represents several broadcast applicants who qualify under Section 309(1). Speaking on its own behalf, IBC maintains changing the assignment criteria midway through the process does the various qualifying applicants a cruel disservice. In the NPRM, the Commission insists that, "pending applicants have no vested right to a comparative hearing under the statute;" but rather the Commission has "broad rulemaking authority" to revise processing rules for pending applicants. IBC submits certain applicants and their attorneys may differ with that assessment and subject their proceedings to additional years of delay while the Commission's stance is argued through the courts. Instead of imposing auctions upon pre-July 1997 applicants, IBC recommends the Commission revise its comparative review procedures in a way so as to pass judicial review. Each pre-July 1997 applicant advanced his or her filing on the basis of how well that proposal could serve the public interest, not on how much wealth he or she possessed. The Commission errs when it implies in the NPRM that by allocating spectrum to those who value it the most (that is, who offer the highest bid), the Commission is selling it to those best able to serve the public.

#### TREATMENT OF OTHER PENDING APPLICANTS

In its NPRM, the Commission acknowledges another, somewhat limited, list of broadcast applicants, those who have submitted construction permit applications, either before or after July 1, 1997, but before imposition of



the Commission's application freeze at the close of business November 26, 1997. Among those are numerous mutually-exclusive applications for whom legislation demands resolution through competitive bidding. But another, somewhat smaller, category remains, one occupied by applicants for new or major change AM or FM broadcast facilities which face no mutual exclusivity. The NPRM states the Commission will continue to accept and process FM rulemaking petitions, "but will not issue any new (AM or FM) cut-off lists or open any new filing windows." The reluctance to open new FM filing windows may be understandable, since no parties have yet filed for said allocations; hence, none are adversely impacted. But in the case of cut-off lists, the suspension of expeditious processing imposes procedural delays, financial hardship and regulatory uncertainty. Particularly in the AM service, many of these applications are for facilities upgrades, doubtful to receive competing applications and some filed even before the Balanced Budget Act's adoption. IBC urges the Commission resume its issuance of cut-off lists, especially for AM or FM translator proposals, both new and modified. Should a mutually exclusive application be filed during such a window, then and only then would award of a construction permit be delayed until after auction.

#### AUCTION LOGISTICS

A point-by-point examination of the Commission's proposed auction mechanics is simply beyond the scope of IBC to address in a statement this brief. However, IBC maintains the methodology of competitive bidding should be as simple and straightforward as possible, one able to be understood by the average individual as well as the communications attorney or corporate CEO. An AM, FM or television license cannot be equated with that for land-mobile services or cellular telephone. And Commission procedures suitable for profit-only communications services may prove wholly inadequate in services for which public service is a component.

First, location. The Commission proposes bidding be remote, rather than on-site, purportedly to provide bidders the flexibility to bid from any location. To the contrary, IBC urges the Commission demand all applicants to convene at one location in Washington at a date and time to be determined by FCC staff. Furthermore, only principals of the applicant, not his attorney or agent, would be allowed to bid. Such restrictions would help ensure that only sincere, committed parties would choose to participate. IBC fears that remote bidding would only encourage phantom participation by invisible, unaccountable entities at the end of some computer terminal. The public demands better.

Next, procedure. Under procedures advanced previously in this comment, only those applicants determined to be legally, financially and technically qualified for a particular facility would be eligible to participate. Rather than holding simultaneous multiple-round auctions for all facilities nationwide, IBC suggests individual auctions for each proposed facility, not necessarily on the same date or at the same location. Since an auction would prove far less time consuming than the past practice of comparative hearings, individual auctions should not by any means tax Commission resources. In any event, to avoid a bidding melee, IBC recommends any auctions be conducted sequentially, rather than simultaneously.

As for upfront payments, reserve prices or minimum opening bids, IBC urges the Commission not impose a "one size fits all" financial formula, or raise the bar so high as to thwart the small entrepreneur. Should the Commission adopt IBC's recommendation of requiring long-form applications prior to auction, the long-form's filing fee (two-to-three thousand dollars for new AM or FM stations) should provide sufficient documentation of good-faith intent. And IBC warns against using a strictly population-based ("pops") or market-size methodology for broadcast assignment. A low-power Class A

and a high-power Class C FM allotment should not be assigned the same price, even in the same market. Neither should an AM and FM facility, each with comparable population reach. And similar-sized markets nationwide may display far different qualitative factors in terms of prosperity, demographics and growth potential. IBC suggests any minimum payments be kept as low as possible, and eliminated altogether when appropriate.

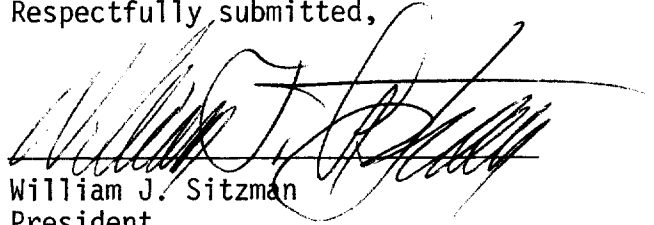
Finally, in terms of cooperation among applicants, IBC urges the Commission function as facilitator, not adversary. From the point when mutual exclusivity is determined to the point of auction, applicants should be free to negotiate, modify facilities to resolve contour overlap, and withdraw from the proceeding if necessary. With applications filed either before or after July 1, 1997, the Commission should continue to allow one competing party to "buy out" the other for reasonable out-of-pocket expenses at any time prior to the auction itself. Such settlements should be permitted even if anti-collusion rules otherwise prohibit discussion of bidding strategy.

#### CONCLUSION

When referring to comparative review, IBC borrows a phrase President Clinton has used toward affirmative action, "The Commission should mend it, not end it." Comparative hearings have been imperfect, but they've generally done well in assigning broadcast licenses to the most worthy applicants. True, Congress has handicapped the Commission by requiring competitive bidding for a wide range of new broadcast applications. And the Commission is duty-bound to comply. But IBC pleads with the Commission to go no farther than its Congressional mandate. It urges the Commission specifically exclude from auction qualifying pre-July 1997 applications, and also exempt most major change facilities applications. And when competitive bids are required, procedures should be as uncomplicated as possible and designed so as to encourage applications only by sincere, dedicated parties

who've done their homework, carefully chosen their communities of license, and advanced their filings with their first objective that of serving the public interest. "Mom and pop" broadcasters, currently a fragile breed in this industry, must be offered the opportunity to compete toe-to-toe in assignment proceedings with the biggest of the big. Legitimate technical criteria must be upheld, not just at the license's final award, but at every step of the process. And both the Commission and Congress must not inadvertently place revenue generation ahead of doing what's right. In that context, Independent Broadcast Consultants, Inc. urges the Commission's thoughtful review of its opinions and recommendations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William J. Sitzman", is written over a horizontal line.

William J. Sitzman  
President  
Independent Broadcast Consultants, Inc.

January 23, 1998